(2)

No. 90-116

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

DELBERT NEIL HELM, d/b/a
BILL'S GREEN LIGHT AUTO PARTS,

Petitioner,

v.

MID-AMERICA INDUSTRIES, INC.,

Respondent.

On The Petition For Writ of Certiorari
To The State Of Arkansas Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

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DELBERT NEIL HELM, d/b/a
BILL'S GREEN LIGHT AUTO PARTS,

Petitioner,

v.

MID-AMERICA INDUSTRIES, INC.,

Respondent.

On The Petition For Writ of Certiorari To The State Of Arkansas Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

The constitutional validity of State Statutes was never drawn in question nor was a Federal question specifically set up or claimed in the Court of first instance, from all of which the Arkansas Supreme Court declined to rule on any such question for the first time on appeal, and by reason of which this Court should decline to entertain the Petition for Writ of Certiorari.

ARGUMENT

Contrary to what Petitioner would lead this Court to believe, he never, at any time, challenged the constitutionality of any statutes in the Court of first instance.

In his Motion to Dismiss, Petitioner stated:

> Comes now defendant and pursuant to Rule 12 of the Arkansas Rules of Civil Procedure moves the Court to dismiss this cause against him and as grounds would show to the Court that this Court lacks subject matter jurisdiction; this Court lacks jurisdiction over the person of defendant; venue herein is improper; service of process upon defendant is insufficient; and there is pending another action between the same parties arising out of the same transaction or occurrence.

Appendix "A" to Respondent's Brief in Opposition.

In its reply in opposition to the Motion to Dismiss, Respondent stated:

> Venue under the circumstances of the case at bar is governed by A.C.A. §16-60-109 which provides in pertinent part:
>
> > "Contract actions against a nonresident of this state or a foreign corporation may be brought in the county in which the plaintiff resided at the time the cause of action arose."

Appendix "B" to Respondent's Brief in Opposition.

Petitioner was fully apprised at the outset of the specific venue statute on which Respondent relied. He was obligated to raise any Federal question at that time.

Thus, the Arkansas Supreme Court in declining to entertain any constitutional attack for the first time on appeal said:

> Helm has also made an argument that §16-60-109(a) is unconstitutional. We do not reach the issue because there is nothing to show that the argument was raised in the Trial Court. *Wilson v. Wilson*, 270 Ark. 485, 606 S.W.2d 56 (1980).

Helm v. Mid-America Indus., Inc., 301 Ark. at 525 (1990) found in Appendix "A" to the Petition for Writ of Certiorari.

The Petitioner must follow the state procedures in raising any Federal question. *In re Lamkin*, 355 U.S. 59 (1957), reh'g denied, 355 U.S. 908 (1957). Thus, when required by state practice, the Federal question must be raised before the Trial Court. It must be presented to the Trial Court at the point considered appropriate under state procedure. A state procedural rule which forbids the raising of Federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power. *Williams v. Georgia*, 349 U.S. 375, 382-3 (1955). Thus, in *Beck v. Washington*, 369 U.S. 541, 550 (1962), the Court recognized the reasonableness of a State Supreme Court's refusal "to consider constitutional attacks upon statutes not made in the trial court, even where the constitutional claims arise from the trial court's interpretation of the challenged statute."

In *Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897), this Court said:

> . . . the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.

166 U.S. at 655. See also, *Webb v. Webb*, 451 U.S. 493, 496 (1981).

If the State Court does no more than discuss the interpretation of the State Statute, without considering such interpretation in light of a Federal question properly presented to it, the Supreme Court should not consider the Federal point. *Beck v. Washington*, 369 U.S. 541, 549-550 (1962).

The party invoking the Supreme Court's jurisdiction has the burden of showing that he properly raised the question, so that the State Court's failure to deal with it was not for want of proper presentation. *Webb v. Webb*, 451 U.S. 493, 495 (1981). As Rule 14(1)(h) of the Court states, a Petition seeking review of a State Court decision must "specify the stage in the proceedings, both in the Court of first instance and in the Appellate Courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari."

By not challenging the constitutionality of the State Statute in the Court of first instance, Petitioner has waived any Federal issue and there is no basis for the assertion of this Court's jurisdiction. *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *C.I.O. v. McAdory*, 325 472, 477 (1945).

Where, as here, a Federal question is initially raised in an assignment of errors filed in the highest State Court, which refuses to consider any issue not presented to the Trial Court, the jurisdiction of the Supreme Court cannot attach. *Bailey v. Anderson*, 326 U.S. 203, 206-7 (1945); *Webb v. Webb*, 451 U.S. 493, 498-499 (1981).

Petitioner can point to no place in the record of the Court of first instance where he challenged the constitutionality of State Statutes or claimed that his Federal rights were being violated. This being so, it is difficult to understand how Petitioner could state, as he does, at page 18 of his Petition, that "The Petitioner has from [the] inception of Respondent's action claimed that his Federal constitutional rights of due process and equal protection of the laws is being violated by the Arkansas Courts. . . ."

With respect to the nature of this cause of action, the Arkansas Supreme Court held that it was the burden of Petitioner who was challenging venue to show the action amounted to no more than one on an open account and that he had failed to do that, pointing out that his abstract of the record was "flagrantly deficient." Rule 9 of the Arkansas Supreme Court requires the essential portions of the record to be abstracted by the Petitioner in such a way as to allow the Court to decide the issues being

raised. Appendix "C" to Respondent's Brief in Opposition. Thus, the Complaint set forth in Appendix "D" to the Petition for Certiorari was never properly presented to the Arkansas Supreme Court for its consideration as its opinion so reflects at 301 Ark. at 521 found in Appendix "A" to the Petition for Writ of Certiorari. Moreover, Respondent's Supplemental Abstract, as the Court observed, pointed to proof tending to show that the dispute, at least in part, had to do with written and oral agreements, and that Petitioner, who had the burden of demonstrating that venue was improper, had not shown that the action amounted to no more than one on an open account.

In *John v. Paullin*, 231 U.S. 583 (1913) the Court said:

> Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.

231 U.S. at 585. See also *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960); *Central Union Tel. Co. v. Edwardsville*, 269 U.S. 190 (1925); *Chesapeake & Ohio R. Co. v. McDonald*, 214 U.S. 191 (1909).

CONCLUSION

It is clear from the opinion of the Arkansas Supreme Court and from the record in this case that Petitioner

never raised any Federal question in the Court of first instance. Moreover, Petitioner also failed to comply with the Arkansas Supreme Court's Rule 9 governing his obligation to adequately abstract the record on appeal for the proper presentation of issues to be decided by the Court. For these reasons, the Arkansas Supreme Court acted properly in refusing to entertain for the first time on appeal any challenge to the constitutionality of State Statutes and, for the same reasons, this Court should decline to entertain Petitioner's Writ of Certiorari.

Respectfully submitted,

MID-AMERICA INDUSTRIES, INC.,
Respondent,

BY: /s/ WILLIAM P. THOMPSON
WILLIAM P. THOMPSON
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P.O. Box 818
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APPENDIX "A"

IN THE CIRCUIT COURT OF SEBASTIAN COUNTY,
ARKANSAS
FORT SMITH DISTRICT

MID-AMERICA INDUSTRIES, INC. PLAINTIFF

vs. No. CIV-88-925 (III)

DELBERT NEIL HELM d/b/a BILL'S GREEN LIGHT AUTO PARTS DEFENDANT

MOTION TO DISMISS

Comes now Defendant and pursuant to Rule 12 of the Arkansas Rules of Civil Procedure and moves the Court to dismiss this cause against him and as grounds would show to the Court that this Court lacks subject matter jurisdiction; this Court lacks jurisdiction over the person of Defendant; venue herein is improper; service of process upon Defendant is insufficient; and there is pending another action between the same parties arising out of the same transaction or occurrence.

Respectfully submitted,

BILL B. WIGGINS
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P.O. Box 8065
Fort Smith, Arkansas 72902

/s/ Bill B. Wiggins
Attorney for Defendant

CERTIFICATE OF SERVICE

This is to certify that on this 15th day of November, 1988 I mailed a true and correct copy of the above and foregoing instrument to Mr. William P. Thompson, Attorney at Law, P.O. Box 818, Fort Smith, Arkansas 72902.

/s/ Bill B. Wiggins

APPENDIX "B"

IN THE CIRCUIT COURT OF SEBASTIAN COUNTY,
ARKANSAS
FORT SMITH DISTRICT

MID-AMERICA INDUSTRIES, INC. PLAINTIFF

vs. No. CIV-88-925 (III)

DELBERT NEIL HELM d/b/a BILL'S GREEN LIGHT AUTO PARTS DEFENDANT

REPLY BRIEF IN OPPOSITION
TO MOTION TO DISMISS

Venue under the circumstances of the case at bar is governed by A.C.A. 16-60-109 which provides in pertinent part:

> "Contract actions against a non-resident of this state or a foreign corporation may be brought in the county in which the plaintiff resided at the time the cause of action arose."

. . . .

Respectfully submitted,

MID-AMERICA INDUSTRIES, INC.
Plaintiff

/s/ William P. Thompson
William P. Thompson
James M. Llewellyn, Jr.
Thompson, Paddock & Llewellyn, P.A.
P.O. Box 818
Fort Smith, AR 72902
501/785-2867

CERTIFICATE OF SERVICE

I, William P. Thompson, have on this 28th day of November, 1988, caused a true and correct copy of the foregoing Reply Brief in Opposition To Motion To Dismiss to be mailed postage prepaid to the following: Bill B. Wiggins, Esq., P.O. Box 8065, Fort Smith, Arkansas 72902.

/s/ William P. Thompson

APPENDIX "C"

RULES OF THE ARKANSAS SUPREME COURT

Rule 9.

ABSTRACTS AND BRIEFS, CONTENTS

(d) Abstract. – The appellant's abstract or abridgment of the records should consist of an impartial condensation, without comment or emphasis, of *only* such material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to this court for decision. –